80570-9

Supreme Court No. (to be set)
Court of Appeals No. 34442-4-II
IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
vs.
John L. Strand
Appellant/Petitioner

Clallam County Superior Court
Cause No. 05-2-00129-4
The Honorable Judge George L. Wood

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner John L. Strand, the appellant below, asks this Court to review the decision of Division II of the Court of Appeals referred to in Section II below.

II. COURT OF APPEALS DECISION

John L. Strand seeks review of the Court of Appeals opinion entered on July 31, 2007. A copy of the opinion is attached.

III. ISSUES PRESENTED FOR REVIEW

ISSUE 1: May the state disregard the procedures set forth in RCW 71.09.040 by subjecting someone to a sexually violent predator evaluation without first obtaining a judicial determination of probable cause?

ISSUE 2: Must the state establish the voluntariness of a person's statements when it seeks to introduce them at that person's civil commitment trial under RCW 71.09?

ISSUE 3: Was Mr. Strand denied the effective assistance of counsel when his lawyer failed to object to the unlawfully obtained SVP evaluation, permitted a follow-up evaluation, and allowed him to be deposed and called as a witness at trial?

ISSUE 4: Did the failure to preserve Dr. Donaldson's testimony violate Mr. Strand's right to be tried by a court of record, his right to due process, and his right to appeal?

IV. STATEMENT OF THE CASE

A. Prior Proceedings

John Strand was committed as a sexually violent predator under RCW 71.09. He appealed, and the Court of Appeals affirmed his commitment in an opinion dated July 31, 2007.

B. Statement of Facts

In 1992, John Strand was convicted of child molestation and sentenced to prison. Supp. CP, Exhibit 4. Before Mr. Strand was

released, Dr. Kathleen Longwell interviewed him and completed an evaluation "pursuant to RCW 71.09," despite the fact that no petition had been filed. RP (1-31-06) 127; CP 104. During the evaluation interview, Mr. Strand made numerous admissions relating to uncharged incidents of sexual misconduct. Dr. Longwell relied upon these and other statements in concluding Mr. Strand qualified as a sexually violent predator. CP 104-106.

On February 7, 2005, the state filed a petition alleging that Mr. Strand was a sexually violent predator under RCW 71.09. CP 11-12. An attorney was appointed on February 7, 2005.[1] CP 89.

With his attorney present, Mr. Strand submitted to a second evaluation on November 8, 2005, and a deposition on December 6, 2005. RP (1-31-06) 127-128; RP (2-1-06) 130. He also testified at trial. RP (2-1-06). His attorney did not object to the use of his initial evaluation, and did not attempt to limit his second evaluation, his deposition, or his trial testimony based on his continuing exposure for uncharged criminal offenses.

At trial, the state sought to admit allegations of prior offenses, including prior uncharged misconduct, as substantive evidence. The

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[1] Substitute counsel was appointed on March 4, 2005. RP (3-4-05) 6.

defense objected, arguing that the incidents were not sufficiently tied to the defendant and thus could not be admitted as substantive evidence. RP (1-30-06) 13-14, 24-25, 84; CP 50-87. The judge overruled the objections and admitted the evidence of prior misconduct as substantive evidence, relying upon Mr. Strand's admissions (to Dr. Longwell and in his deposition) to establish the foundation for the prior misconduct. RP (1-30-06) 27-30, 84-85.

Dr. Longwell testified that Mr. Strand felt no remorse about his actions and was not troubled by the consequences of his behavior. She opined that he was likely to reoffend in a sexually violent manner. RP (1-31-06) 180-181, 190; RP (2-1-06) 47, 55. She acknowledged that she considered Mr. Strand's statements in reaching her conclusions. RP (1-31-06) 162.

To counter Dr. Longwell's conclusions, the defense called its own expert, Dr. Theodore Donaldson; however, the court's recording system was not activated, so his testimony was not preserved. When it was discovered that the defense case had not been recorded, Mr. Strand moved for a mistrial, arguing that a reconstructed record could not be complete since the testimony was complex, and since his attorney was focused on presenting her case and not on taking notes. RP (2-6-06) 5-12. The motion was denied, and the court ordered both attorneys to submit

proposed Narrative Reports of Proceedings for consideration. RP (2/6/06) 15.

Mr. Strand then filed a written motion for a new trial. CP 39-43. At a hearing held on March 3, 2006, Mr. Strand made numerous objections to the proposed narrative, citing his attorney's lack of memory and inability to evaluate the accuracy of the proposed narrative. RP (3-3-06); CP 44-49. The court denied Mr. Strand's motion for a new trial and adopted a modified version of the state's proposed narrative report of proceedings. RP (3-3-06) 4-39; CP 18-38. According to the trial judge, no appeal issues could arise from the missing record. RP (3-3-06) 39.

Mr. Strand appealed. CP 6. The Court of Appeals affirmed his commitment.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. This Court should accept review of Issue 1 and determine whether the state is free to disregard the procedures set forth by the legislature in RCW 71.09.040 when pursuing civil commitment under RCW 71.09. This issue involves significant questions of constitutional law that are of substantial public interest. RAP 13.4(b)(3); RAP 13.4(b)(4).

RCW 71.09.040 provides the exclusive means for evaluating a potential sexually violent predator. *In re Williams*, 147 Wn.2d 476, 55 P.3d 597 (2002). Such an evaluation is appropriate "only after probable

cause has been determined... The legislature expressly provided procedures for special mental health evaluations in the SVP statute and did not intend to allow for additional [evaluations]." *In re Det. of Meints*, 123 Wn. App. 99 at 103-104, 96 P.3d 1004 (2004).

In this case, the state disregarded the statutory procedure developed by the legislature by subjecting Mr. Strand to a sexually violent predator evaluation without obtaining a judicial determination of probable cause. The Court of Appeals elected not to review this issue, finding that Mr. Strand had not raised a manifest error affecting a constitutional right. Court of Appeals Opinion, p. 6.

This Court should accept review and determine whether or not the state may disregard the procedure established by the legislature in RCW 71.09.040. This issue presents a manifest error affecting a constitutional right; it may therefore be raised for the first time on appeal. RAP 2.5(a)(3).[2]

First, Mr. Strand had a statutory right to consult with counsel and to have counsel present during his evaluation. RCW 71.09.050(1). *But see In re Kistenmacher*, 134 Wn. App. 72, 138 P.3d 648 (2006), *review*

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[2] Furthermore, RAP 2.5 is discretionary, and this court may review the issue even absent a manifest error affecting a constitutional right.

granted at 159 Wn.2d 1019 (2007).[3] By deliberately circumventing the statutory procedure outlined in RCW 71.09.040, the state made an end-run around the statutory right to counsel. This deliberate act violated Mr. Strand's constitutional right to due process. *See, e.g., State v. Warner*, 125 Wn.2d 876 at 890, 889 P.2d 479 (1995) (intentional delay to circumvent the juvenile justice system violates due process).

Competent counsel would have advised Mr. Strand to remain silent rather than participate in the evaluation (since he faced ongoing exposure for uncharged incidents). *In re Gault*, 387 U.S. 1 at 49, 18 L. Ed. 2d 527, 87 S. Ct. 1428 (1967); *In re Young*, 122 Wn.2d 1 at 51, 857 P.2d 989 (1993), *habeas corpus petition granted and reversed on other grounds, see Young v. Weston,* 192 F.3d 870 (9th Cir. 1999). Without Mr. Strand's statements, the outcome of the trial would have been different because the state would not have been able to establish the foundation for admission of uncharged incidents, and the evaluator would not have been able to consider those incidents in forming her opinion. Thus the issue presents a manifest error affecting a constitutional right under RAP 2.5(a)(3).

Second, Mr. Strand had a constitutional right to consult with counsel and to have counsel present during his evaluation. *But see*

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[3] Argument in *Kistenmacher* is scheduled for September 27, 2007.

Kistenmacher, supra. The state's procedure violated that constitutional right; furthermore, by deliberately circumventing the statutory procedure to deprive Mr. Strand of counsel, the state violated Mr. Strand's right to due process. *Warner, supra.* Again, competent counsel would have advised him to remain silent, which would have changed the outcome of the proceedings. *Gault, supra; In re Young, supra.* Accordingly, the issue presents a manifest error affecting a constitutional right under RAP 2.5(a)(3).

Third, Mr. Strand had a constitutional right to remain silent under the Fifth and Fourteenth Amendments to the U.S. Constitution, because he was at risk of prosecution for uncharged offenses. *Gault, supra; In re Young, supra.* Under the state's procedure, he was not advised of his right to remain silent or his right to counsel.[4] Again, without Mr. Strand's participation, the evaluator would not have been able to use some of the uncharged allegations in forming her opinion, and the state would not have

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[4] The Court of Appeals concluded that Mr. Strand was not subjected to custodial interrogation, and thus not entitled to *Miranda's* protections. *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). But Mr. Strand was in custody as defined by *State v. Post,* 118 Wn.2d 596, 826 P.2d 172 (1992). Furthermore, he was interrogated within the meaning of *Pennsylvania v. Muniz,* 496 U.S. 582 at 601, 110 S. Ct. 2638; 110 L.Ed 528 (1990).

been able to introduce them at trial.[5] Since the trial's outcome would have been different in the absence of Mr. Strand's statements, the issue presents a manifest error affecting a constitutional right, and may be raised for the first time on review. RAP 2.5(a)(3).

Fourth, Mr. Strand has a constitutional right not to be disturbed in his private affairs without authority of law. Wash. Const. Article I, Section 7. By subjecting Mr. Strand to a highly intrusive sexually violent predator evaluation without following the requirements of RCW 71.09.040, the state disturbed Mr. Strand in his private affairs without authority of law.[6] The entire evaluation was tainted by this constitutional violation, and should have been suppressed. Without the evaluation, the state would not have been able to proceed and Mr. Strand would not have been committed as a sexually violent predator. Accordingly, the issue

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[5] The Court of Appeals glibly contends that "Strand did not incriminate himself at any point." Opinion, p. 5. This is incorrect: Mr. Strand implicated himself by admitting contact with the alleged victims (although he denied sexual contact).

[6] Although consent might provide the authority of law to conduct the evaluation without a judicial determination of probable cause, such consent may only be extracted in compliance with the constitution. *See, e.g., State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998). Here, Mr. Strand was not advised of his statutory and constitutional right to counsel or his constitutional right to remain silent, and he was not fully advised of the consequences of cooperating with the evaluation. Under these circumstances, his consent cannot support the invasion into his privacy.

presents a manifest error affecting a constitutional right and may be considered for the first time on review. RAP 2.5(a)(3).[7]

The Court of Appeals also relied on Mr. Strand's purported consent in declining to review the issue. Court of Appeals Opinion, pp. 4, 5-6. A finding of consent implies that Mr. Strand waived his right to counsel and his right to remain silent. Waiver of a fundamental constitutional right must be the intentional relinquishment or abandonment of a known right or privilege. *Johnson v. Zerbst,* 304 U.S. 458 at 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). Such a waiver must be made knowingly, voluntarily, and intelligently. *State v. Thomas*, 128 Wn.2d 553 at 558, 910 P.2d 475 (1996). Courts indulge every reasonable presumption against waiver. *Johnson v. Zerbst,* at 464. In the absence of warnings thoroughly explaining Mr. Strand's rights and the consequences of waiver-- warnings such as those required by *Miranda, supra*, or *State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998)-- Mr. Strand can not be shown to have knowingly, voluntarily, and intelligently waived his right to counsel and his right to remain silent. Thus the Court of Appeals' reliance

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[7] This argument (alleging a violation of Wash. Const. Article I, Section 7) was not made to the Court of Appeals. However, this court may consider an argument made for the first time in a Petition for Review. *State v. Mendez,* 137 Wn.2d 208 at 216-217, 970 P.2d 722 (1999).

on Mr. Strand's purported consent cannot justify its refusal to address the state's noncompliance with RCW 71.09.040.

The state deliberately circumvented the procedure established by the legislature in order to deny Mr. Strand the rights afforded him by the constitution and by RCW 71.09. In doing so, the state also disturbed Mr. Strand in his private affairs without authority of law. This Court should accept review to determine whether or not Mr. Strand should be granted a new trial as a result. This issue involves significant questions of constitutional law that are of substantial public interest. RAP 13.4(b)(3); RAP 13.4(b)(4).

B. This Court should accept review of Issue 2 and determine whether the state bears the burden of establishing the voluntariness of any statements it seeks to introduce at a civil commitment hearing under RCW 71.09. This issue involves a significant question of constitutional law that is of substantial public interest. RAP 13.4(b)(3); RAP 13.4(b)(4).

The government may not use a person's involuntary statements against them in a civil proceeding. *See, e.g., Bong Youn Choy v. Barber*, 279 F.2d 642 at 646 (9th Cir. 1960); *see also United States v. Alderete-Deras*, 743 F.2d 645 at 647 (9th Cir. 1984). RCW 71.09 does not set forth standards or a mechanism for determining the voluntariness of a person's statements.

The Court of Appeals did not address RCW 71.09's lack of a procedure for determining voluntariness; nor did the court analyze the burden of proof on the issue. Instead, the court concluded that Mr. Strand "voluntarily participated in the interview after [being advised] that his statements could be used against him in SVP proceedings." Court of Appeals Opinion, p. 7.

This Court should accept review to determine whether or not the state bears the burden of proving voluntariness at a separate hearing prior to a civil commitment trial, as is required in criminal cases. *See Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed. 908 (1964); *see also* CrR 3.5. This is a significant question of constitutional law that is of substantial public interest, and should be decided by the Supreme Court. RAP 13.4(b)(3); RAP 13.4(b)(4).

C. This Court should accept review of Issue 3 and determine whether or not Mr. Strand was denied the effective assistance of counsel by his attorney's failure to object to the unlawful evaluation. This issue involves a significant question of constitutional law that is of substantial public interest. RAP 13.4(b)(3); RAP 13.4(b)(4).

Defense counsel is ineffective when she or he provides deficient performance in a civil commitment trial that prejudices a client's case. *In re Stout*, 128 Wn.App. 21 at 27-28, 114 P.3d 658 (2005); *In re Greenwood*, 130 Wn.App. 277 at 286-287, 122 P.3d 747 (2005).

The state's Petition in this case was based (in large part) on statements obtained from Mr. Strand. The state's expert relied on his statements in concluding that he qualified as a sexually violent predator; furthermore, his statements were used at trial to establish the foundation for admission of uncharged incidents. CP 104-139; RP (1-30-06) 27-30, 84-85.

Mr. Strand's attorney should have objected to the SVP evaluation, since it was obtained in violation of RCW 71.09.040. Had she successfully objected, she would have been able to counsel Mr. Strand to remain silent during the follow-up evaluation, the deposition, and the trial, in order to reduce his criminal exposure for uncharged incidents.[8] Without the evaluation and Mr. Strand's statements, the state would have been unable to proceed to trial.

This Court should accept review of Issue 3 and determine whether or not Mr. Strand was denied the effective assistance of counsel. This issue involves significant questions of constitutional law that are of

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[8] The Court of Appeals did not address Mr. Strand's deposition. The court did hold that counsel's decision to allow him to testify at trial was a tactical decision. Court of Appeals Opinion, p. 7. Had counsel successfully objected to the unlawful evaluation, this tactical decision would have been objectively unreasonable, and would support a claim of ineffective assistance. *See, e.g., State v. Hendrickson*, 129 Wn.2d 61 at 78-79, 917 P.2d 563 (1996).

substantial public interest and should be decided by the Supreme Court. RAP 13.4(b)(3); RAP 13.4(b)(4).

D. This Court should accept review of Issue 4 and determine whether or not the failure to record testimony deprived Mr. Strand of his right to be tried by a court of record, his right to due process, and his right to appeal. This issue involves significant questions of constitutional law that are of substantial public interest and should be decided by the Supreme Court. RAP 13.4(b)(3); RAP 13.4(b)(4).

Wash. Const. Article IV, Section 11 provides that "the superior courts shall be courts of record..." A "court of record" is " '[a] court that is required to keep a record of its proceedings...' " *State ex rel. Henderson v. Woods*, 72 Wn. App. 544 at 550-551, 865 P.2d 33 (1994), *quoting Black's Law Dictionary* (5th ed. 1979). Washington courts have yet to clarify the reach of this constitutional provision or the remedy for its breach.[9]

Due process entitles a person committed under RCW 71.09 to a record of sufficient completeness to permit effective appellate review. U.S. Const. Amend XIV; *State v. Tilton*, 149 Wn.2d 775 at 781, 72 P.3d

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[9] In the only published opinion addressing the provision, Division I held that Article IV, Section 11 does not guarantee a "fundamental constitutional right" to have a court reporter transcribe a criminal trial. *State v. Wilcox*, 20 Wn. App. 617 at 619, 581 P.2d 596 (1978).

735 (2003); *Henderson, supra, at* 551; *see also M.L.B. v. S.L.J.*, 519 U.S. 102 at 107, 117 S.Ct. 555, 136 L.Ed. 2d 473 (1996).

The failure to record evidence presented at trial on behalf of Mr. Strand violates Wash. Const. Article IV, Section 11 and the Fourteenth Amendment. Because trial counsel was unable to recollect significant portions of the missing testimony, neither appellate counsel nor this Court can be assured that the substitute record testimony is adequate for review.

The Court of Appeals-- in a holding that is circular at best-- decided that any errors caused by the missing record "are purely speculative because the record indicates that Donaldson's testimony did not raise any significant issues or objections." Court of Appeals Opinion, p. 8.

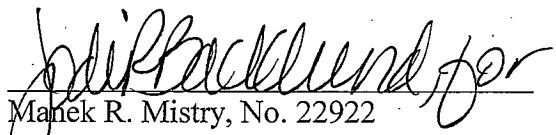
This Court should accept review of Issue 4 to clarify the meaning of Wash. Const. Article IV, Section 11 and the remedy for violation of this provision, and to determine whether Mr. Strand's constitutional right to due process was infringed. These significant questions of constitutional law are of substantial public interest and should be decided by the Supreme Court. RAP 13.4(b)(3); RAP 13.4(b)(4).

VI. CONCLUSION

The issues here raise significant questions of constitutional law that are of substantial public interest. This Court should accept review under to RAP 13.4(b)(3) and (4).

Respectfully submitted August 24, 2007.

BACKLUND AND MISTRY



Manek R. Mistry, No. 22922
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CERTIFICATE OF MAILING

I certify that I mailed a copy of the Petition for Review, postage pre-paid, to:

John L. Strand
McNeil Island
P.O. Box 88600
Steilacoom, WA 98388

and to

Sara Sappington
Office of the Attorney General
800 5th Ave Suite 2000
Seattle, WA 98104-3188

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on August 24, 2007.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on August 24, 2007.

Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

APPENDIX :

Court of Appeals Opinion, Entered July 31, 2007

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

IN RE THE DETENTION OF: JOHN L. STRAND, Appellant, v. STATE OF WASHINGTON, Respondent.	NO. 34442-4-II PUBLISHED OPINION

Van Deren, A.C.J. - John Leonard Strand appeals his commitment as a sexually violent predator (SVP)[1] arguing that: (1) he had a constitutional right to counsel at a chapter 71.09 RCW psychological evaluation conducted before the State filed a petition to have him adjudicated as a SVP and before the required probable cause hearing, (2) his counsel's failure to object to either the pre-filing or the post-filing psychological evaluations constituted ineffective assistance of counsel, and (3) the court's failure to record the testimony of his expert witness deprived him of an official record of that portion of the proceedings. Finding no error, we affirm.

[1] "Sexually violent predator" means any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which actually makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility. RCW 71.9.020(16).

FACTS

In 1992, a jury convicted John Strand of first degree child molestation and the trial court sentenced him to a 150-month exceptional sentence. In January 2004, Dr. Kathleen Longwell interviewed him and completed an evaluation under chapter 71.09 RCW. Longwell informed Strand that the interview was not confidential and that State could use the information gathered against him in a SVP case. Strand signed a consent form agreeing to an evaluation interview with Longwell.

During the interview, Strand denied committing any sex crimes, including the child molestation offense for which he was incarcerated. He denied any sexual interest, contact, or fantasies involving children. Based on the interview and a review of his records, Longwell diagnosed Strand with pedophilia, antisocial personality disorder, and alcohol dependence, concluding that these disorders predisposed him to commit violent sex crimes. She determined that he was in the highest risk range for sexual recidivism.

On February 7, 2005, the State filed a SVP commitment petition and a certification for determination of probable cause under Chapter 71.09 RCW. The following day, the trial court appointed an attorney to represent Strand. Thereafter, Strand submitted to a second evaluation on November 8, 2005, and to a deposition on December 6, 2005.

Before trial, Strand moved to exclude testimony from the State's witnesses about prior un-adjudicated sex offenses, arguing that the incidents were not relevant because they may not have occurred and he may not have been the perpetrator. But, during his interviews and in his deposition and trial testimony, Strand admitted to having non-sexual contact with the witnesses at the described times and places. The trial court concluded that it was more likely than not that the incidents occurred and allowed the State's witnesses to testify.

At trial, consistent with the court's ruling, the State introduced testimony from six witnesses, including Strand's sister, about actual and attempted acts of abuse against children. One of the incidents led to a conviction for lewdness; the remaining incidents were either unreported or the charges were dismissed.

Longwell testified about her conclusions based on interviews with Strand and review of his records. In her opinion, Strand felt no remorse about his behaviors and their consequences did not trouble him. She believed he would likely sexually re-offend in a violent, predatory manner.

The defense called its own expert, Dr. Theodore Donaldson, who testified that Strand did not meet the SVP criteria. But, due to an error, the trial court did not activate its recording system and Donaldson's testimony was not preserved. As soon as the error was discovered, Strand moved for a mistrial, arguing that a reconstructed record could not substitute for Donaldson's complex testimony. The trial court denied his motion for mistrial, ruling that the parties could reconstruct the testimony from Donaldson's deposition.

The jury determined that Strand was a SVP. After the jury returned its verdict, the trial court directed the parties to reconstruct Donaldson's testimony. Strand objected to several portions of the State's proposed narrative and moved for a new trial. After making several changes to incorporate Strand's objections, the trial court was satisfied that the reconstructed record, with Donaldson's deposition incorporated, was accurate and sufficient.

Strand appeals.

ANALYSIS

I. EVALUATION BEFORE FILING SVP PETITION

Strand argues that the State violated his rights because Longwell evaluated him before the State filed a SVP petition because RCW 71.09.040[2] provides for evaluation only after the probable cause determination. He claims that under *In re Detention of Williams*, 147 Wn.2d 476, 491, 55 P.3d 597 (2002), RCW 71.09.040 is the excusive means of evaluating whether an individual is a SVP and the State failed to follow the statute.

But Strand consented to the pre-petition interview. And to preserve an error for appeal, counsel must call it to the trial court's attention so the trial court has an opportunity to correct it. *State v. Wicke*, 91 Wn.2d 638, 642, 591 P.2d 452 (1979). We do not consider errors raised for the first time on appeal except manifest errors affecting a constitutional right. [3]

Strand makes several arguments claiming that the evaluation process deprived him of his constitutional rights. We consider each in turn.

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[2] RCW 71.09.040 provides in relevant part:

> (1) Upon the filing of a petition under RCW 71.09.030, the judge shall determine whether probable cause exists to believe that the person named in the petition is a sexually violet predator. If such determination is made the judge shall direct that the person be taken into custody.
>
> . . . .
>
> (4) If the probable cause determination is made, the judge shall direct that the person be transferred to an appropriate facility for evaluation as to whether the person is a sexually violent predator. The evaluation shall be conducted by a person deemed to be professionally qualified to conduct such an examination.

[3] RAP 2.5(a)(3) provides in relevant part: "The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: . . . (3) manifest error affecting a constitutional right."

A. Right to Counsel During SVP Evaluations

Strand contends that the evaluation procedure was unconstitutional because it deprived him of the right to counsel during his SVP evaluation.

SVP offenders "have a statutory right to counsel during all stages of a commitment trial." *In re Detention of Stout*, 128 Wn. App. 21, 27, 114 P.3d 658 (2005). But there is no constitutional right to counsel at psychological evaluations conducted in the course of SVP proceedings. *In re Detention of Kistenmacher*, 134 Wn. App. 72, 73, 138 P.3d 648 (2006), *review granted*, 159 Wn.2d 1019 (2007). We reject Strand's request to reconsider our decision in *Kistenmacher* or to create a new requirement for counsel before a SVP petition is filed.

B. Self-Incrimination

Strand also asserts that by denying him counsel at the pre-petition evaluation, the State violated his Fifth Amendment privilege[4] not to incriminate himself because he remains vulnerable to criminal prosecution for the un-adjudicated incidents.

To prevail on a claim of a Fifth Amendment violation, there must be a "'realistic threat of self-incrimination'" in a subsequent proceeding. *State v. King*, 130 Wn.2d 517, 524, 925 P.2d 606 (1996) (quoting *Minnesota v. Murphy*, 465 U.S. 420, 427, 104 S. Ct. 1136, 79 L. Ed. 2d 409 (1984)). But Strand did not incriminate himself at any point. Moreover, a defendant must invoke the Fifth Amendment privilege for it to apply, except in a custodial interrogation or a situation where assertion of the privilege would be penalized. *State v. Warner*, 125 Wn.2d 876, 884, 889 P.2d 479 (1995). Strand was not compelled to answer any of the State's queries; to the contrary, he consented to the interview after Longwell asked him if he wanted to participate and

[4] No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. U.S. CONST. amend. V.

informed him that his statements could be used against him in SVP proceedings. Absent compulsion, the interview does not constitute "interrogation." *See Warner*, 125 Wn.2d at 884. Strand fails to establish constitutional error based on violation of his Fifth Amendment privilege.

Strand does not demonstrate that he had a constitutional right to counsel at his psychological evaluation or that the absence of counsel deprived him of his privilege against self-incrimination. Because Strand failed to show that the pre-petition SVP evaluation affected any constitutional right, we decline to consider his objection to the State's evaluation procedure for the first time on appeal. RAP 2.5(a)(3).

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Next, Strand argues that his attorney provided ineffective assistance by failing to object to the evaluation procedure or dispute the voluntariness of his statements, contending that competent counsel would have preserved these issues for review.

To prevail on the claim, he must show that his attorney's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the outcome. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). We give great deference to trial counsel's performance and presume that counsel was effective, viewing the representation in light of all the circumstances. *McFarland*, 127 Wn.2d at 335; *State v. Weber*, 137 Wn. App. 852, 858, 155 P.3d 947 (2007). Matters of trial strategy or tactics do not establish that counsel's performance was deficient. *Weber*, 137 Wn. App. at 858. And when counsel fails to object to the admission of evidence, a defendant alleging ineffective assistance must show that the trial court would likely have sustained the objection. *Detention of Stout*, 159 Wn.2d 357, 377, 150 P.3d 86 (2007) (defendant entitled to effective assistance of counsel in SVP proceeding); *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Trial counsel's decision not to contest the State's pre-petition evaluation and failure to request a voluntariness hearing on the admissibility of his statements to Longwell was not objectively unreasonable. Strand voluntarily participated in the interview after Longwell advised him that his statements could be used against him in SVP proceedings. A reasonable attorney could conclude that because Strand acquiesced in the procedure and signed a consent form, he would probably not prevail on the issue.

Next, Strand argues that competent counsel would have advised him to assert his Fifth Amendment privilege and refuse to testify about the uncharged events. But the decision whether to call a witness to testify is a matter of trial strategy and, therefore, does not show ineffective assistance. *State v. King*, 24 Wn. App. 495, 499, 601 P.2d 982 (1979). Moreover, the decision about whether to testify ultimately resides with the defendant, not counsel. *State v. Robinson*, 138 Wn.2d 753, 758, 982 P.2d 590 (1999). Strand's decision to testify and deny committing any sex crimes was a tactical decision and cannot establish ineffective assistance of counsel. Strand fails to show that his attorney's performance was objectively unreasonable; therefore his ineffective assistance of counsel argument fails.

III. FAILURE TO RECORD TESTIMONY

Finally, Strand contends that his commitment must be overturned because the trial court did not preserve Donaldson's testimony in a verbatim report of proceedings. Strand requests a new trial, arguing that the trial court's failure to record his only witness's testimony violated the constitutional requirement that trial courts be courts of record and violated his rights to due process and appeal.

Strand has no constitutional right to a verbatim report of proceedings. *State v. Tilton*, 149 Wn.2d 775, 781, 72 P.3d 735 (2003). To satisfy due process, a criminal defendant[5] is entitled to "a record of sufficient completeness" for purposes of an appeal. A "record of sufficient completeness" does not necessarily mean a complete verbatim report of proceedings and, as long as another method allows effective review, such method is constitutionally permissible. *Tilton*, 149 Wn.2d at 781 (citations omitted).

The trial court discovered the inadvertent taping error the day after it occurred. While discussing the error, Strand's counsel agreed that there were no significant objections raised during Donaldson's testimony. Strand's counsel made numerous objections to the State's proposed narrative, which the trial court addressed. The trial court also determined that Donaldson's deposition testimony was substantially the same as his testimony at trial and incorporated it into the reconstructed record.

Strand fails to demonstrate that the combination of Donaldson's deposition and the reconstructed narrative record is insufficient to allow effective appellate review. He contends that appellate review is hindered because rulings on objections are unavailable, trial counsel had no notes of Donaldson's testimony, trial counsel disagreed with the trial court's conclusions about what happened, the jury may not have heard important testimony, the State may have elicited inadmissible testimony on cross-examination, and trial counsel may have provided ineffective assistance. But, these potential errors are purely speculative because the record indicates that Donaldson's testimony did not raise any significant issues or objections.

[5] Though Strand is not a criminal defendant, because he is facing involuntary commitment, we apply a similar standard.

In any event, Strand has not taken the necessary steps to complete the record and thereby has waived any objection. A party who contends that the record is deficient must supplement the record through affidavits. *State v. Miller*, 40 Wn. App. 483, 488, 698 P.2d 1123 (1985). Strand has made no attempt to supplement the record with affidavits from trial counsel or the trial court and, therefore, we do not consider his argument further.

Remand for a new trial is only appropriate where the trial court's report of proceedings is insufficient for appellate review and when appropriate affidavits cannot adequately supplement the record. *Tilton*, 149 Wn.2d at 783. Because Strand failed to make a showing that the record, including Donaldson's deposition testimony is insufficient for review, his argument fails.

Affirmed.

Van Deren, A.C.J.

We concur:

Bridgewater, J.

Quinn-Brintnall, J.